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Hong Kong Court of Appeal confirms win for bank in mis-selling case

The Court of Appeal recently unanimously upheld the first instance decision in *DBS Bank (Hong Kong) Ltd v Sit Pan Jit*, handed down in April 2015. In rejecting every ground of appeal raised by the appellant, the Court of Appeal found that the approach adopted by the judge at first instance was *"impeccable"* and that there was nothing to indicate that the trial judge's decision should be overturned. However, with the introduction of a *"suitability requirement"* in client agreements, cases like this may become academic and banks will need to document their interactions with customers even more closely.

The appellant, Mr Sit, appealed against the decision of Judge Marlene Ng in favour of DBS Bank (Hong Kong) Ltd (DBS) dismissing his mis-selling counterclaim against the bank.[1]

The appellant had entered into a number of contracts with DBS in respect of various financial products and had suffered significant losses on those products during the 2008 financial crisis. DBS brought proceedings to recover monies owed in respect of the products and Mr Sit counterclaimed for mis-selling.

Specifically, he alleged (amongst other things) that: (i) there was an oral contract between himself and DBS whereby he agreed to engage DBS' services in making investments for him and DBS agreed to so serve him; (ii) DBS had made common law and statutory misrepresentations (pursuant to section 108 of the Securities and Futures Ordinance (Cap. 571) (SFO)) to him about the products prior to his entering into the underlying contracts, including in respect of the risks associated with the products; and (iii) DBS had breached its fiduciary, tortious and contractual duties to him.

DBS denied the allegations and relied on its standard non-reliance clauses in the underlying contracts, the effect of which was that DBS had no duty to give investment advice to the customer and, even if DBS did give any investment advice, it was provided on an *"execution only"* basis and the customer was not entitled to rely on the advice and should exercise his own independent judgment in making investment decisions.

The Court at first instance rejected Mr Sit's allegations in respect of the alleged oral contract and also rejected his misrepresentation claim on the basis that the misrepresentations, as a matter of fact, had not been proved. Even if the misrepresentations had been proved, Mr Sit was prevented as a matter of contractual estoppel from asserting that he was induced and/or had relied upon any representations by DBS on the basis of the non-reliance clauses. The Court further held there was no reason why the principles of contractual estoppel would not apply to misrepresentation claims pursuant to section 108, SFO.

Key issues

- The Court of Appeal found the first instance decision was *"impeccable".*
- An appeallate court would only disturb a finding of fact made by a trial judge where the judge's decision was *"plainly wrong".*
- DBS' decision not to call its former employee not to testify was reasonable.
- Previous decisions concerning the applicability of so-called *"non-reliance"* clauses may be less relevant given the SFC's changes to the Professional Investor Regime.

[1] Clifford Chance Client Briefing April 2015: *Hong Kong High Court upholds the effectiveness of non-reliance clauses in bank customer contracts*

The Court of Appeal's Findings

The Court of Appeal recognised at the outset that it was well settled that an appellate court would only disturb a finding of fact made by a trial judge in circumstances where that judge's decision at first instance was *"plainly wrong"*.

The appellant's primary argument was that the trial judge had applied a wrong approach in assessing and determining the credibility of the appellant in respect to issues concerning his misrepresentation claims. It was also argued that the trial judge had failed to give enough consideration to particular pieces of evidence and had failed to draw adverse inferences against DBS for its failure to call a former employee (who was the relationship manager alleged to have made the misrepresentations to Mr Sit) to give evidence. The applicability of the doctrine of contractual estoppel was also challenged.

In his judgment given on behalf of the bench, Poon JA was satisfied that the trial judge had given proper consideration to all evidence put before her and was well entitled to find that Mr Sit was a poor and unreliable witness, and to reject his evidence on the core matters.

The Court of Appeal also accepted that DBS' decision not to call its former employee to testify was reasonable and satisfactorily explained. The ex-employee had been convicted and sentenced to 26 months imprisonment for having illegally accepted over HKD 1 million in benefits from the appellant as an inducement or reward for doing or having done acts in relation to the affairs or business of DBS as his principal. He was also ordered to pay to DBS a substantial portion of the benefits that he received. The bank's management had attempted to contact the ex-employee, to no avail. In this context, the Court of Appeal found that it was understandable why the ex-employee was not called as a witness and that the trial judge was perfectly entitled not to draw any adverse inference against DBS.

In relation to the appellant's submissions as to the inapplicability of contractual estoppel as a defence to a claim brought under section 108 SFO, this was dismissed swiftly by the Court of Appeal on the basis of their finding that there had been no misrepresentation to begin with.

Ultimately, the Court of Appeal unequivocally agreed with the judgment handed down at first instance and found no reason to disturb any of its findings or reasoning.[2]

Implications

The Court of Appeal's decision follows a steady line of cases in Hong Kong in which banks have been successful in depending upon non-reliance clauses in their client agreements and standard terms of business.

However, these decisions confirming the applicability of contractual estoppel and non-reliance clauses in Hong Kong may become somewhat academic in light of reforms to the Professional Investor Regime introduced by the SFC in December 2015 which will effectively negate the operation of non-reliance clauses.

As set out in our previous briefing,[3] all client agreements must include the following clause: *"If we [the intermediary] solicit the sale of or recommend any financial product to you [the client], the financial product must be reasonably suitable for you having regard to your financial situation, investment experience and investment objectives. No other provision of this agreement or any document which we ask you to sign and no statement we may ask you to make derogates from this clause."*

As above, the wording of the clause seeks explicitly to rule out the possibility of a bank raising contractual estoppel as a defence by the inclusion of the wording.

Disputes going forward may focus on the suitability of the financial product for a particular individual. Banks will need to demonstrate they have made sufficient efforts to ascertain suitability and that sufficient records are kept in respect of any transactions, including records of any statements made to the client both orally and in writing.

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[2] *DBS Bank (Hong Kong) v Sit Pan Jit* [2016] HKEC 1307

[3] Clifford Chance Client Briefing December 2015 – *SFC seeks to abolish non-reliance clauses with new suitability requirement*

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